

In the case of Hoffmann v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Bernhardt, President,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr B. Walsh,
Mr C. Russo,
Mr N. Valticos,
Mr I. Foighel,
Mr M.A. Lopes Rocha,
Mr G. Mifsud Bonnici,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 29 January and 26 May 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 15/1992/360/434. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 April 1992, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12875/87) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by an Austrian, Mrs Ingrid Hoffmann, on 20 February 1987.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8, 9 and 14

(art. 8, art. 9, art. 14) of the Convention and Article 2 of Protocol No. 1 (P1-2).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). The President gave him leave to use the German language during the proceedings (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 25 April 1992 the President drew by lot, in the presence of the Registrar, the names of the other seven members, namely Mr L.-E Pettiti, Mr B. Walsh, Mr R. Macdonald, Mr C. Russo, Mr N. Valticos, Mr I. Foighel and Mr G. Mifsud Bonnici (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Mr Macdonald was later replaced by Mr M.A. Lopes Rocha, substitute judge, as he was unable to attend (Rules 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the applicant's representative on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the resulting orders and instructions, the Registrar received the memorial of the applicant and the memorial of the Government on 17 September 1992 and 21 September 1992 respectively. The Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 January 1993. The Court had held a preparatory meeting beforehand. Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal, who was unable to attend (Rule 21 para. 5, second sub-paragraph).

There appeared before the Court:

(a) for the Government

Mr W. Okresek, Federal Chancellery, Agent,
Mr F. Haug, Federal Ministry for Foreign Affairs, Adviser;

(b) for the Commission

Mrs J. Liddy, Delegate;

(c) for the applicant

Mr R. Kohlhofer, Rechtsanwalt, Counsel,
Mr A. Garay, Avocat, Counsel,
Mr H. Renoldner, Adviser.

The Court heard their addresses as well as replies to the

questions of some of its members.

AS TO THE FACTS

I. The particular circumstances of the case

A. Introduction

6. Mrs Ingrid Hoffmann is an Austrian citizen residing in Gaissau. She is a housewife.

7. In 1980 Mrs Hoffmann - then Miss Berger - married Mr S., a telephone technician. At that time, they were both Roman Catholics.

Two children were born to them, a son, Martin, in 1980 and a daughter, Sandra, in 1982. They were baptised as Roman Catholics.

8. The applicant left the Roman Catholic Church to become a Jehovah's Witness.

9. On 17 October 1983 the applicant instituted divorce proceedings against Mr S. She left him in August or September 1984 while the proceedings were still pending, taking the children with her.

The divorce was pronounced on 12 June 1986.

B. Proceedings before the Innsbruck District Court

10. Following their separation, both the applicant and Mr S. applied to the Innsbruck District Court (Bezirksgericht) to be granted parental rights (Elternrechte) over the children.

Mr S. submitted that if the children were left in the applicant's care, there was a risk that they would be brought up in a way that would do them harm. He claimed that the educational principles of the religious denomination to which the applicant belonged were hostile to society, in that they discouraged all intercourse with non-members, all expressions of patriotism (such as singing the national anthem) and religious tolerance. All this would lead to the children's social isolation. In addition, the Jehovah's Witnesses' ban on blood transfusions might give rise to situations in which their life or their health was endangered.

With regard to the son, Martin, Mr S. noted that he would eventually have to refuse to perform military service or even the civilian service exacted in its stead.

The applicant claimed that she was better placed to take care of the children, being in a position to devote herself to them completely, and as a mother better able to provide them with the necessary family environment. She alleged that Mr S. did not even provide for their maintenance, as he was both legally and morally bound to do. She acknowledged, however, that she intended to bring the children up in her own faith.

The youth office of the Innsbruck District Authority (Bezirkshauptmannschaft, Abteilung Jugendfürsorge) expressed a preference for granting parental rights to the applicant; it referred to, inter alia, the expert opinion of a child psychologist.

11. By decision of 8 January 1986, the District Court granted parental rights to the applicant and denied them to Mr S.

According to its reasoning, only the children's well-being fell to be considered. The material living conditions of both parents were such that either of them would be able to take proper care of the children; however, the father would need his mother's help. The children had stronger emotional ties with the applicant, having lived with her for a year and a half already, and separating them from her might cause them psychological harm. It followed that it was preferable to leave the children with the mother.

The District Court further observed:

"As against this, it has been stated by the children's father, essentially as his only argument, that Ingrid S.'s membership of the religious community of the Jehovah's Witnesses has serious detrimental effects on the children. As to this, it ought to be made clear right away that in no case are parents' religious convictions as such a relevant criterion in deciding on parental rights and duties pursuant to Article 177 para. 2 of the Civil Code. These rights cannot be refused to a parent or withheld from him for the sole reason that he or she belongs to a religious minority.

However, in the concrete case it needs to be examined whether the mother's religious convictions have a negative influence on her upbringing of the children which should be taken into account and whether their well-being is impaired as a result. It appears in particular that Ingrid S. would not allow blood transfusions to be given to her children; that for herself she rejects communal celebration of such customary holidays as Christmas or Easter; that the children experience a certain tension in relation to an environment which does not correspond to their faith; and that their integration in societal institutions such as kindergarten and school is made more difficult. However, the father's apprehension of complete social isolation as a result of the mother's religion does not appear well-founded in the light of the established facts. In addition, no possible dangers to either child's development have appeared in the course of the establishment of the facts.

It is true that the facts adduced (blood transfusions, holidays, impaired social integration) are in principle capable of having detrimental effects on the children. This point must now be examined in the context of the

particular case. It appears first of all that the father's argument that Martin and Sandra would be exposed in an emergency to serious danger to their life and health by the refusal of a blood transfusion is not of decisive importance. In the absence of parental permission for a medically necessary blood transfusion to either child, such permission can be replaced by a judicial decision in accordance with Article 176 of the Civil Code (compare the decision of the Innsbruck Regional Court (Landesgericht) of 3 July 1979, 4R 128/79). In any case, according to this legal provision, anyone can apply to the court for an order that is necessary to ensure the welfare of the child when the parent endangers it by his conduct. In view of this possibility of applying to the court, which is available at all times, no danger to the children need be inferred from the mother's attitude to blood transfusions.

As for Ingrid S.'s rejection of holidays, notice must be taken of her express agreement to allow the father to take the children on such occasions and celebrate them with the children as he sees fit. The mother's religious convictions thus do not deprive Martin and Sandra of the possibility of celebrating these holidays in the usual way, so that no detriment to the children can be found in this regard either.

Of the reservations with regard to the mother's upbringing of the children resulting from her religion the only remaining one of any significance is the circumstance that Martin and Sandra will in later life experience somewhat more difficulty in finding their way in social groups as a result of the religious precepts of the Jehovah's Witnesses and will find themselves to some extent in a special position. However, the court cannot consider this so detrimental to the children's welfare that they should for that reason not be entrusted to their mother, with whom they have such a close psychological relationship and to whose care they are accustomed. Careful consideration must lead to the conclusion that in spite of more difficult social integration, as discussed above, it appears to be more in the interest of the children's welfare to grant parental rights to the mother than to transfer them to the father."

C. Proceedings before the Innsbruck Regional Court

12. Mr S. appealed against the above decision to the Innsbruck Regional Court (Landesgericht).

13. The Regional Court rejected the appeal by decision of 14 March 1986. Its grounds for so doing were the following:

"The main thrust of the appeal is to argue that the decision of the first-instance court is incompatible with the children's welfare in view of the mother's membership of the religious community of the Jehovah's Witnesses.

In this connection, the appellant discusses the criteria and objectives peculiar to that religious community and the resulting social attitudes, which are in his opinion wrong; it follows, in his view, that both children are bound to suffer harm if the parental rights and duties are assigned to the mother, and in particular that they may be forced into social isolation removed from reality.

The appellant's line of argument in this regard is unsound. The Jehovah's Witnesses, formerly known as Serious Bible Students, a community based upon their own interpretation of the Bible, are not outlawed in Austria; it may therefore be assumed that their objectives neither infringe the law nor offend morality (see Article 16 of the Basic Law in conjunction with Article 9 (art. 9) of the European Convention on Human Rights). Therefore, the mother's membership of that religious community cannot of itself constitute a danger to the children's welfare ...

Admittedly, the mother's religion will in all probability affect the children's care and upbringing, and they may come to experience a certain tension in relation to an environment which does not correspond to their faith. The first-instance court has already dealt at length with part of the appellant's arguments that relate thereto and has given detailed and conclusive reasons why the father's objections against assigning the parental rights and duties to the mother cannot in the final instance be decisive. The new points raised on appeal - relating to a lack of understanding of democracy and a lack of subordination to the State - cannot cast doubt on the first-instance decision as regards the children's welfare; it suffices in this respect to recall the legal recognition of the religious community of the Jehovah's Witnesses, which meant, contrary to the appellant's allegation, that the first-instance court did not in fact need to seek ex officio an expert opinion on the objectives or the 'nature' of the Jehovah's Witnesses. Nor were the first-instance proceedings incomplete because no expert medical opinion was sought regarding the question, which was raised anew on appeal, of blood transfusions, which are rejected by the Jehovah's Witnesses; in the event that a judicial remedy (a decision pursuant to Article 176 of the Civil Code) arrives too late, it will in the final instance be up to the physician treating the patient, when confronted with the problem, to reach a decision, with a view in the first place to life-saving medical action and only in the second place taking into account the rejection of blood transfusions which is peculiar to the Jehovah's Witnesses.

The appellant's further line of argument - to the effect that a properly arranged transfer of the children to himself and properly arranged visiting rights for the mother could not cause the same shock as had the mother's forcible removal of the children, and that the decision under appeal had legalised her unilateral action - also

fails to convince. The appellant overlooks the fact that, in view of the paramount importance of the children's welfare, the way in which they reached the place where they are currently being taken care of is not necessarily decisive. Even illegal conduct would be of relevance only to the extent that it might, in an individual case, be possible to infer therefrom a lack of suitability for care or upbringing; it is not otherwise decisive for determining the attribution of parental rights and duties whether or not the parent concerned has taken charge of the children without authorisation. It remains true, however, that both children have for a long time developed harmoniously in the mother's care, that there is a closer relationship with her than with the father, and that, whatever the religious or philosophical views of the mother, neither child has suffered any harm in his or her physical or - particularly - psychological development; in fact the appellant could not seriously claim that they had actually suffered in the latter respect."

D. Proceedings before the Supreme Court

14. Mr S. lodged an appeal on points of law (außerordentlicher Revisionsrekurs) with the Supreme Court (Oberster Gerichtshof).

15. By decision of 3 September 1986, the Supreme Court overturned the judgment of the Innsbruck Regional Court, granting parental rights to Mr S. instead of the applicant. It gave the following reasons:

"The appellant has not hitherto claimed that the children belonged to the Roman Catholic faith; however, he has stated, and it has in fact been established, that the mother is bringing them up according to the principles of the Jehovah's Witnesses' teaching. It is also uncontested that the children do not belong to this confession. The lower courts had therefore to examine whether or not the mother's bringing up the children in this way contravened the provisions of the Federal Law of 1985 on the Religious Education of Children (Bundesgesetz über die religiöse Kindererziehung), BGBl (Bundesgesetzblatt, Federal official Gazette) 1985/155 (re-enactment of the Law of 15 July 1921 on the Religious Education of Children, dRGB (deutsches Reichsgesetzblatt, German Reich Gazette) I. 939). According to Article 1 of the 1921 Act the religious education of a child shall be decided upon by an agreement freely entered into by the parents, in so far as the responsibility for his or her care and upbringing is vested in them. Such an agreement may be revoked at any time and is terminated by the death of either spouse. Article 2, paragraph 1, of the 1921 Act lays down that if such an agreement does not or ceases to exist, the provisions of the Civil Code on the care and upbringing of children shall extend to their religious education. However, according to Article 2, paragraph 2 of the 1921 Act, during the existence of the

marriage neither parent may decide without the consent of the other that the child is to be brought up in a faith different from that shared by both parents at the time of the marriage or from that in which he or she has hitherto been brought up.

Since in any case the children do not belong to the faith of the Jehovah's Witnesses, their education according to the principles of this sect (which is not, as the appellant rightly points out, a recognised religious community: see Adamovich-Funk, Österreichisches Verfassungsrecht, [Austrian Constitutional Law], Vol. 3, p. 415) contravenes Article 2, paragraph 2, of the 1921 Act. The Regional Court's failure to apply this provision is obviously in breach of the law.

Moreover, the lower courts also failed in their decisions to give due consideration to the children's welfare That the mother, as has been established, would refuse to consent to the children's receiving a necessary blood transfusion constitutes a danger to their well-being, since requesting a court to substitute its consent for that of the mother ... may in urgent cases involve a life-threatening delay and medical intervention without seeking the approval of the person entitled to take care of the child is considered contrary to the law It has also been established that if the children are educated according to the religious teaching of the Jehovah's Witnesses, they will become social outcasts. In the initial decision as to which of the spouses is to have the right to provide care and upbringing, these circumstances cannot be ignored. Although it is preferable for young children to be taken care of by their mother ..., this applies only provided that all other things are equal There is no maternal privilege as regards the attribution of parental right The stress caused to the children by being transferred to the care of the other parent, which in any case is usually transitory, has to be accepted in their own best interests The file contains no documentary basis for the assumption that a change to another carer 'would with a high degree of probability cause the children serious psychological harm' Even according to the opinion of the lower courts, the father is able to see to the children's upbringing, since they have a good relationship with him and with their grandmother, who would take charge of their care and upbringing during the father's absence at work; the availability of accommodation for the children in the house of the father's parents is assured. Therefore, only transfer of parental rights and duties to the father is in the children's interest."

II. Jehovah's witnesses

16. Numbering about four million worldwide not counting uninitiated sympathisers, the Jehovah's Witnesses form a particular religious movement. It originated in America in the

1870s. Formerly known by names such as International Bible Students, the Jehovah's Witnesses took their present name in 1931.

17. A central feature of Jehovah's Witness doctrine is the belief that the Holy Scriptures in the original Hebrew and Greek are the revealed word of Jehovah God and must therefore be taken as literal truth.

The refusal to accept blood transfusions is based on several scriptural references, most notably Acts 15: 28-29, which reads (New World translation):

"For the holy spirit and we ourselves have favored adding no further burden to you, except these necessary things, to keep abstaining from things sacrificed to idols and from blood and from things strangled and from fornication. If you carefully keep yourselves from these things, you will prosper ..."

III. Relevant domestic law

A. The Civil Code

18. Article 177 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch) deals with the custody of children in an event such as the dissolution of their parents' marriage by divorce. It reads:

"(1) Where the marriage between the parents of a legitimate minor has been dissolved, annulled or declared void, or where the parents are separated other than merely for a temporary period, they may submit to the court an agreement concerning which of them shall in the future have custody of the child. The court shall approve the agreement if it is in the interests of the child's welfare.

(2) Where no agreement is reached within a reasonable time, or if the agreement reached is not in the interest of the child's welfare, the court shall decide which parent is to have sole custody of the child in the future; in the case of a separation of the parents which is not merely temporary, such a decision shall be taken only on application by one of them."

19. Both during and after the parents' marriage, the court may be called upon to substitute its approval or consent for that of the parents (or parent). The relevant provision is Article 176, which reads:

"Where the conduct of the parents threatens the welfare of a minor, the court shall be required, irrespective of who has applied to it, to make the orders necessary for the protection of the child's welfare. Such an order may also be made on application by one of the parents when the parents have failed to reach an agreement concerning a matter of importance to the child. In particular the

court may withdraw custody of a child, either wholly or in part, including rights of approval and consent provided by law. In individual cases the court is also required to substitute its approval or consent for parental approval or consent required by law, when there is no justified reason for refusal."

20. In taking decisions under Articles 176 and 177, the courts follow the criteria set out in Article 178a, which reads:

"In assessing the interests of the minor, his or her personality and needs must be duly taken into consideration, particularly his or her talents, abilities, inclinations and developmental opportunities, as well as the material circumstances of the parents."

B. Regulation of religious life

21. Religious freedom is guaranteed by Article 14 of the Basic Law (Staatsgrundgesetz), which reads:

"(1) Complete freedom of beliefs and conscience is guaranteed to everyone.

(2) Enjoyment of civil and political rights shall be independent of religious confessions; however, a religious confession may not stand in the way of civic duties.

(3) No one shall be compelled to take any church-related action or to participate in any church-related celebration, except in pursuance of a power conferred by law on another person to whose authority he is subject."

22. Austria has a system of recognition of religious communities. It is governed by the Act of 20 May 1874 concerning the Legal Recognition of Religious Communities (Gesetz betreffend die gesetzliche Anerkennung von Religionsgesellschaften), RGBL (Reichsgesetzblatt, Official Gazette of the Austrian Empire) 1874/68. Only five religious communities are so recognised, among them the Roman Catholic Church but not the Jehovah's Witnesses. Religious groupings without legal recognition have legal personality as "societies" (Vereine) under the general law.

23. The religious education of children is governed by the Federal Act on the Religious Education of Children, which re-enacted a German law dating from 1921 that was incorporated into Austrian law in 1939 (see paragraph 15 above).

Article 1 reads:

"The religious education of a child shall be decided upon by an agreement freely entered into by the parents, in so far as the responsibility for the child's care and upbringing is vested in them. Such an agreement may be revoked at any time and is terminated by the death of either spouse."

Article 2 reads:

"(1) If such an agreement does not or ceases to exist, the provisions of the Civil Code on the care and upbringing of children shall extend to their religious education.

(2) During the existence of their marriage neither parent may decide without the consent of the other that the child is to be brought up in a faith different from that shared by both parents at the time of their marriage or from that in which he or she has hitherto been brought up, or that a child is to cease to attend religious education classes.

(3) In the absence of such consent, application may be made for the mediation of, or a decision by, the guardianship court. In any such decision the interests of education shall be paramount even in cases not covered by Article 176 of the Civil Code. Before the decision is taken the child's parents, and if necessary relatives, relatives by marriage and teachers, must be heard if this is possible without significant delays or disproportionate costs. The child itself must be heard if it has reached the age of ten."

C. Medical action

24. The need for parental permission for administering blood transfusions to minors follows from the law governing medical action in general.

Thus, the Hospitals Act (Krankenanstaltengesetz), BGBI 1/1957, lays down in Article 8:

"(1)...

(2) Hospital patients may be medically treated only in accordance with the principles and recognised methods of medical science.

(3) Special curative treatments including surgical operations may be carried out on a patient only with his consent, but if the patient has not yet reached the age of eighteen or if because he lacks mental maturity or health he cannot assess the necessity or usefulness of the treatment, only with the consent of his legal representative. Consent is not required if the treatment is so urgently necessary that the delay involved in obtaining the consent of the patient or his legal representative or in appointing a legal representative would endanger his life or would entail the danger of serious harm to his health. The medical director of the hospital or the doctor responsible for the management of the hospital department concerned shall decide on the necessity and urgency of treatment."

25. It is a criminal offence to administer medical treatment without the requisite consent; this follows from Article 110 of

the Criminal Code (Strafgesetzbuch), which reads:

"(1) Whoever treats another person, even according to the rules of medical science, without having obtained that person's consent, shall be liable to imprisonment for up to six months or to a fine of up to 360 daily rates.

(2) If the offender has failed to obtain the consent of the patient because he assumed that a delay in the treatment would entail a serious risk for the life or health of the patient, he shall be punished according to paragraph 1 only if the assumed risk did not exist and if by taking due care ... he could have been aware of this.

(3) The offender shall be punished only at the request of the person who underwent unauthorised treatment."

PROCEEDINGS BEFORE THE COMMISSION

26. Mrs Hoffmann applied to the Commission on 20 February 1987. She complained that she had been denied custody of the children on the ground of her religious convictions. She invoked her right to respect for her family life (Article 8 of the Convention) (art. 8), her right to freedom of religion (Article 9) (art. 9) and her right to ensure the education of her children in conformity with her own religious convictions (Article 2 of Protocol No. 1) (P1-2); she further claimed that she had been discriminated against on the ground of religion (Article 14) (art. 14).

27. The application (no. 12875/87) was declared admissible on 10 July 1990. In its report of 16 January 1992 (Article 31) (art. 31), the Commission expressed the opinion:

(a) by eight votes to six, that there had been a violation of Article 8 read in conjunction with Article 14 (art. 14+8);

(b) by twelve votes to two, that no separate issue arose in regard to Article 9 (art. 9) taken separately or in conjunction with Article 14 (art. 14+9);

(c) unanimously, that there had been no violation of Article 2 of Protocol No. 1 (P1-2).

The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment*.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 255-C of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

I. ALLEGED VIOLATION OF ARTICLE 8 (art. 8), TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14 (art. 14+8)

28. The applicant complained that the Austrian Supreme Court had awarded parental rights over the children Martin and Sandra to their father in preference to herself, because she was a member of the religious community of Jehovah's Witnesses; she claimed a violation of her rights under Article 8 (art. 8) of the Convention, both taken alone and read in conjunction with Article 14 (art. 14+8).

The Government denied that there had been a violation at all, whereas the Commission agreed that there had been a violation of Article 8 taken in conjunction with Article 14 (art. 14+8).

29. According to Article 8 para. 1 (art. 8-1) of the Convention, "Everyone has the right to respect for his private and family life, his home and his correspondence."

The Court notes at the outset that the children had lived with the applicant for two years after she had left with them before the judgment of the Supreme Court of 3 September 1986 compelled the applicant to give them up to their father. The Supreme Court's decision therefore constitutes an interference with the applicant's right to respect for her family life and the case thus falls within the ambit of Article 8 (art. 8). The fact relied on by the Government in support of the opposite view, namely that the Supreme Court's decision was taken in the context of a dispute between private individuals, makes no difference in this respect.

A. Alleged violation of Article 8 taken in conjunction with Article 14 (art. 14+8)

30. In view of the nature of the allegations made, the Court, like the Commission, considers it appropriate to examine the present case under Article 8 taken in conjunction with Article 14 (art. 14+8), which reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

31. In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, amongst other authorities, the *Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, p. 32, para. 58).

It must first be determined whether the applicant can claim to have undergone different treatment.

32. In awarding parental rights - claimed by both parties - to the mother in preference to the father, the Innsbruck District Court and Regional Court had to deal with the question whether the applicant was fit to bear responsibility for the children's care and upbringing. In so doing they took account of the practical consequences of the religious convictions of the Jehovah's Witnesses, including their rejection of holidays such as Christmas and Easter which are customarily celebrated by the majority of the Austrian population, their opposition to the administration of blood transfusions, and in general their position as a social minority living by its own distinctive rules. The District and Regional Courts took note of the applicant's statement to the effect that she was prepared to allow the children to celebrate holidays with their father, who had remained Roman Catholic, and to allow the administration of blood transfusions to the children if and when required by law; they also considered the psychological relationship existing between the children (who were very young at the time) and the applicant and her general suitability as a carer.

In assessing the interests of the children, the Supreme Court considered the possible effects on their social life of being associated with a particular religious minority and the hazards attaching to the applicant's total rejection of blood transfusions not only for herself but - in the absence of a court order - for her children as well; that is, possible negative effects of her membership of the religious community of Jehovah's Witnesses. It weighed them against the possibility that transferring the children to the care of their father might cause them psychological stress, which in its opinion had to be accepted in their own best interests.

33. This Court does not deny that, depending on the circumstances of the case, the factors relied on by the Austrian Supreme Court in support of its decision may in themselves be capable of tipping the scales in favour of one parent rather than the other. However, the Supreme Court also introduced a new element, namely the Federal Act on the Religious Education of Children (see paragraphs 15 and 23 above). This factor was clearly decisive for the Supreme Court.

The European Court therefore accepts that there has been a difference in treatment and that that difference was on the ground of religion; this conclusion is supported by the tone and phrasing of the Supreme Court's considerations regarding the practical consequences of the applicant's religion.

Such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst other authorities, the *Darby v. Sweden* judgment of 23 October 1990, Series A no. 187, p. 12, para. 31).

34. The aim pursued by the judgment of the Supreme Court was a legitimate one, namely the protection of the health and rights of the children; it must now be examined whether the second

requirement was also satisfied.

35. In the present context, reference may be made to Article 5 of Protocol No. 7 (P7-5), which entered into force for Austria on 1 November 1988; although it was not prayed in aid in the present proceedings, it provides for the fundamental equality of spouses inter alia as regards parental rights and makes it clear that in cases of this nature the interests of the children are paramount.

36. In so far as the Austrian Supreme Court did not rely solely on the Federal Act on the Religious Education of Children, it weighed the facts differently from the courts below, whose reasoning was moreover supported by psychological expert opinion. Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.

The Court therefore cannot find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14 (art. 14+8).

B. Alleged violation of Article 8 (art. 8) taken alone

37. In view of the conclusion reached in paragraph 36 above, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 (art. 8) taken alone; the arguments advanced in this respect are in any case the same as those examined in respect of Article 8 taken in conjunction with Article 14 (art. 14+8).

II. ALLEGED VIOLATION OF ARTICLE 9 (art. 9)

38. The Court considers, as did the Commission, that no separate issue arises under Article 9 (art. 9) either taken alone or read in conjunction with Article 14 (art. 14+9), since the factual circumstances relied on as the basis of this complaint are the same as those which are at the root of the complaint under Article 8 taken in conjunction with Article 14 (art. 14+8), of which a violation has been found.

III. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 (P1-2)

39. The applicant's complaint under Article 2 of Protocol No. 1 (P1-2) was not pursued before the Court, which finds no reason to examine it of its own motion.

IV. APPLICATION OF ARTICLE 50 (art. 50)

40. According to Article 50 (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial

reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant made no claim in respect of non-pecuniary damages but she claimed ATS 75,000 in respect of costs and expenses actually incurred before the Convention organs and not covered by legal aid.

The Commission expressed no opinion as to this claim. The Government found it acceptable; the Court agrees.

FOR THESE REASONS, THE COURT

1. Holds by five votes to four that there has been a violation of Article 8 in conjunction with Article 14 (art. 14+8);

2. Holds unanimously that it is unnecessary to rule on the allegation of a violation of Article 8 (art. 8) taken alone;

3. Holds unanimously that no separate issue arises under Article 9 (art. 9), either taken alone or in conjunction with Article 14 (art. 14+9);

4. Holds unanimously that it is not necessary to rule on the allegation of a violation of Article 2 of Protocol No. 1 (P2-1);

5. Holds by eight votes to one that the respondent State is to pay to the applicant, within three months, for costs and expenses, 75,000 (seventy-five thousand) Austrian Schillings.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 June 1993.

Signed: Rudolf BERNHARDT
President

Signed: Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- dissenting opinion of Mr Matscher;
- partly dissenting opinion of Mr Walsh;
- dissenting opinion of Mr Valticos;
- dissenting opinion of Mr Mifsud Bonnici.

Initialled: R.B.

Initialled: M.A.E.

DISSENTING OPINION OF JUDGE MATSCHER

(Translation)

I feel unable to subscribe to the reasoning and the conclusion of the majority as regards the alleged violation of Article 8 taken in conjunction with Article 14 (art. 14+8).

1. First of all it is necessary to examine whether there really was an interference by a public authority with the applicant's family life within the meaning of Article 8 (art. 8). When they separated, the parents did not reach agreement on custody of the children, both parties claiming it for themselves in the competent courts. At first instance and on appeal the courts found for the mother, while the Supreme Court decided in favour of the father. The case therefore concerned a private dispute between two individuals - each of whom was equally entitled from the beginning - which the courts, to which the parties turned as they had failed to reach an agreement, had to decide on the basis of the applicable law, since the fact that the mother had - without authorisation - taken the children away with her did not give her any additional rights. Accordingly, the fact that the children were taken back to their father's home following the final decision of the Supreme Court was not in itself an interference with the mother's rights within the meaning of Article 8 (art. 8).

2. Even assuming that there was an interference, the following should be noted.

The only criterion on which the courts should base their decision in a case such as this is the welfare of the children. The Supreme Court determined the welfare of the children differently from the courts below. It is not for the Strasbourg Court to substitute its assessment for that of the competent State authorities, which enjoy a wide margin of appreciation in the matter. But it is nevertheless the Court's duty to review whether the choice made by these authorities was within the margin of appreciation that the Convention grants them and did not infringe the rights secured in it.

In this instance it did not. The Supreme Court attached more importance to the adverse effects on the children's welfare which might result from the mother's membership of the religious community of the Jehovah's Witnesses. It did not therefore discriminate against the mother's religion as such but merely took into consideration certain consequences which belonging to that religion might entail for the well-being of the children, and this would seem to me to be wholly legitimate.

Furthermore, the Supreme Court criticised the courts below for neglecting the fact that, in deciding on the children's future religious education unilaterally, the mother had infringed the provisions of the 1921 Act.

3. Even though I do not find in the present case any violation of Article 8 taken together with Article 14

(art. 14+8), I have to deprecate the phrasing of some of the reasons given in the Supreme Court's judgment. But as the Court has noted many times, inept and unfortunate phrasing in a judicial decision does not on its own constitute a violation of the Convention.

PARTLY DISSENTING OPINION OF JUDGE WALSH

1. I do not agree that in this case there was a violation of Articles 8 and 14 (art. 14+8) taken together, or alone, by reason of the Supreme Court's decision which overturned the decision of the lower court by withdrawing from the applicant the custody of her children. The refusal was grounded on the fear that the children's welfare could be put at risk by reason of the applicant's intention not to permit a blood transfusion, if medically necessary, to either of her children should the occasion arise unless ordered to do so by a court.

2. The mother's attitude was dictated by the tenets of the religious society or sect she had joined subsequent to the birth of her children. She had become a member of Jehovah's Witnesses after quitting the Catholic Church and she had accepted the view that to permit blood transfusion for her children, who were in her custody, would be morally wrong. Her children had remained members of the Catholic Church, as had her husband. Her children had no known objection to a necessary blood transfusion. In effect the applicant was imposing her religious beliefs upon the life and health of her children and in disregard of the rights of the father and of the provisions of the Religious Education of Children Act 1921.

3. The father's notice of appeal to the Supreme Court specifically mentioned the withholding of possible blood transfusion as the reason for seeking a reversal of the order of the lower court. That was an objective ground which a court might or might not, in any given case, regard as a sufficient ground for the transfer of custody. That is not a matter upon which this Court could usurp the discretion of the national court. The matter before the Supreme Court was a question of the hazard of the health of the children. In gauging the seriousness of the hazard the Supreme Court recognised that the cause of the hazard was, admittedly, the applicant's new religious views. The reason or motives for the creation of the hazard are but secondary to the objective effect of the existence of the hazard. If the applicant's attitude was not traceable to a religious belief the question before the national court would remain essentially the same. The fact that the hazard was brought into existence by a religious belief not shared by those upon whom it was sought to impose it does not create a situation where the removal of the hazard must necessarily, if at all, be regarded as a discrimination on the grounds of religious belief. The national court's duty was to evaluate or weigh the effects as distinct from the cause.

4. The appeal to the Supreme Court was heard before the divorce of the parents became final. After that a different legal situation arose which could give rise to a further recourse to the national courts in consequence of the effect of the

divorce on the provisions of the Religious Education of Children Act 1921. That is a situation which is not before this Court.

5. I agree with the decision of the Court in relation to Article 8 (art. 8) taken alone, Article 9 (art. 9) and Article 2 of Protocol No. 1 (P1-2).

DISSENTING OPINION OF JUDGE VALTICOS

(Translation)

I am unable to share the opinion of the majority of the Chamber that there was in the present case a violation of Articles 8 and 14 (art. 8, art. 14) of the Convention, in that the Supreme Court's decision refusing to grant Mrs Hoffmann custody of her children constituted discrimination on the grounds of religion.

It is in fact clear, in my opinion, that the said decision by the Supreme Court was not based on the sole fact that Mrs Hoffmann was a Jehovah's Witness, but essentially on the consequences that this would have had for the children's future. The question would surely not have arisen in the case of a different religion not having the special characteristics of Jehovah's Witnesses. Thus the refusal to have blood transfusions could, whatever has been said, have endangered the children's health and even their lives. The peculiarities of this religion's tenets of faith would have led to the children being set apart from normal social life and would have contributed to marginalising them and restricting their future and their development. The children had admittedly not yet been accepted into the faith of Jehovah's Witnesses, but the mother took them with her to the Sunday meetings. Since she made weekly visits for spreading her faith (admittedly without being accompanied by her children), it was to be expected that her children would also become objects of her proselytising zeal, it being natural for her to wish to ensure what she regarded as their salvation.

It should thus have been held that the Supreme Court's decision resulted not from "a distinction based essentially on a difference in religion alone", as the majority of the Court declared, but from the legitimate concern to protect the future of the Hoffmann children.

DISSENTING OPINION OF JUDGE MIFSUD BONNICI

I am unable to agree with the five members of the Court who make up the majority. My reasons are the following:

1. Article 8 (art. 8) of the Convention prohibits interference by a public authority with the exercise of the right of one's private and family life, home and correspondence.

2. In my opinion, a fundamental distinction must be made between interference and intervention. Interference implies that action whereby one interposes or meddles in something, without having the right to do so. Intervention, on the other hand, is that action whereby one steps in-between, to prevent or hinder

a harm which otherwise will occur.

3. Usually, whenever a marriage breaks down, one or both of the parties requests the court to intervene; as did the applicant and her husband, in the instant case. The first necessary intervention therefore came from the Innsbruck District Court. This first decision of the court was appealed from by the husband, to the Regional Court, and a second (extraordinary) appeal was eventually made to the Supreme Court of Austria.

4. Each one of these courts had to reach a decision with regard to the care and custody of the children of the marriage. Each one of them was by law obliged to intervene and I cannot see how one can consider these decisions to be interferences by a public authority in the private and family life of the applicant. Rather, these were all necessary interventions, the like of which occur in their hundreds in the daily court life of all the States of the Council of Europe.

5. The Supreme Court's decision reversed the previous two judgments in that it held that those decisions did not conform with the provisions of the Federal Law of 15 July 1921, which regulated the problem of the religious education of children.

6. This law provides that the question of the religious education of children is to be regulated as follows:

(a) on marriage the question shall be settled by the free agreement of the partners;

(b) the original agreement may be changed by mutual agreement of the parents at any time;

(c) the father or the mother cannot unilaterally change the agreement;

(d) when one of them dies, the agreement lapses.

7. The Supreme Court of Austria decided that the religious education of the Hoffmann children had to be regulated according to the original agreement freely entered into between the parents. The breakup of the marriage did not authorise either one of the parents, or the court, to change the original agreement.

8. The appeal to the Supreme Court was lodged on points of law, mainly on the omission of the lower courts to take account of the 1921 law. This could not in fact be disputed, and one cannot see how the Supreme Court could, in its turn, ignore that law as well. It follows that its decision had to be based on both the elements already in the file and the law of 1921. I cannot see how because of this addition the decision violates the Convention. The lawyer of the applicant, in the oral pleadings, submitted that "the decision of the Supreme Court contradicts Austrian law". I do not believe that I am entitled to hear and decide appeals from the Supreme Court of Austria on the provisions of Austrian law and as to whether Austrian court decisions contradict Austrian law.

9. In view of all this, I consider all the submissions on the merits or demerits of the applicant's religion as being irrelevant to the issue. The only relevant issue is whether the applicant is entitled or not to vary the original agreement on religious instruction which she had reached with her husband, irrespective of the religion to which that agreement referred. And this issue as regulated by Austrian law does not violate the Convention.

10. For these reasons I cannot find that either the decision of the Supreme Court of Austria or the Austrian Federal Law on Religious Instruction are in violation of the Convention. Since I find the application completely unfounded, I am not prepared to grant anything under Article 50 (art. 50).